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**Comment on Maxine
Burkett's
*Rehabilitation:
A Proposal for a
Climate Compensation
Mechanism for Small
Island States***

Randall S. Abate*

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Climate change has caused devastating impacts throughout the world. The regions that are most vulnerable to these impacts are the Arctic and low-lying island nations. Low-lying nations potentially face more difficulties than communities and states in the Arctic, however. These island nations must not only absorb and respond to climate change impacts, but they also face potential loss of sovereignty because relocation to a foreign country will likely be necessary in the near future for many of them.¹ Because devastating physical, economic, and cultural impacts threaten to displace populations in island nations, immediate action is necessary from the international community to assist these nations in adapting to these impacts and to continue to thrive culturally and politically.

Professor Maxine Burkett is one of the leading scholars in the world on climate justice, and her work has spearheaded scholarship involving the rights of island nations in addressing climate change impacts.² Climate justice can be divided into (1) compensation and liability and (2) sovereignty and relocation. Professor Burkett's article evaluated in this comment addresses the former category.³ Her article proposes a Small Island Compensation and Rehabilitation Commission (CRC) that would provide compensation for climate loss and damage for slow-onset loss caused by climate change.⁴

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1. The internal displacement that Arctic indigenous communities face is equally tragic and demands urgent domestic attention. *See generally* Randall S. Abate, *Corporate Responsibility and Climate Justice: A Proposal for a Polluter-Financed Relocation Fund for Federally Recognized Tribes Imperiled by Climate Change*, 25 FORDHAM ENVTL. L. REV. 10 (2013).
 2. From 2009 to 2012, Professor Burkett served as the inaugural Director of the Center for Island Climate Adaptation and Policy (ICAP) at the University of Hawai'i William S. Richardson School of Law. As the Director of ICAP, she led projects to address climate change law, policy, and planning for island communities in Hawai'i, the Pacific region, and beyond. In 2010, she served as the Wayne Morse Chair of Law and Politics at the Wayne Morse Center, University of Oregon, for the Center's "Climate Ethics and Climate Equity" theme of inquiry. Professor Burkett has written extensively on climate justice and island adaptation issues. For a sampling of this scholarship, see generally Maxine A. Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 U. HAW. L. REV. 633 (2013); Maxine A. Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 GEO. MASON L. REV. 775 (2013); Maxine A. Burkett, *Litigating Climate Change Adaptation: Theory, Practice, and Corrective (Climate) Justice*, 42 ENVTL. L. REP. 11144 (2012); Maxine A. Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115 (2011); Maxine A. Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509 (2009); Maxine A. Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169 (2008).
 3. Professor Burkett has also examined the sovereignty and relocation aspects of climate justice. *See, e.g.*, Maxine A. Burkett, *The Nation Ex-Situ*, in THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 89 (Michael B. Gerrard & Gregory E. Wannier eds., 2015).
 4. *See generally* Maxine A. Burkett, *Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States*, 13 SANTA CLARA J. INT'L L. 81 (2015).

Professor Burkett's article is a timely, ambitious, and significant contribution to the literature on climate change compensation and liability. In the most recent Conference of the Parties (COP) to the United National Framework Convention on Climate Change (UNFCCC) in Warsaw, Poland in November 2013, a Climate Loss and Damage Mechanism was drafted.⁵ Although an important step in the right direction, this mechanism is a largely aspirational, mere first step toward providing meaningful climate justice to island nations. Professor Burkett's article seeks to accelerate the process of providing relief for slow-onset climate loss and damage for island nations.

With full appreciation for Professor Burkett's thoughtful and ambitious undertaking in proposing the CRC for small island nations in her article, this comment addresses some concerns about her approach. The comment proceeds from a simple thesis: climate adaptation measures are best applied in the contexts of "prevention" and "cure." First, climate adaptation funding and implementation makes most sense when addressed as a proactive measure to enhance a country's ability to respond to and absorb climate change impacts. Second, climate change adaptation responses should again be engaged at the back end of the process, when nations or communities within them are forcibly displaced from their homelands by rising sea levels or other extreme climate change-related events. The middle ground between these two ends of the spectrum is where Professor Burkett focuses her analysis, and it is in this context where several conceptual and logistical challenges arise.

The starting premise of Professor Burkett's article is uncontroversial. The Alliance of Small Island States (AOSIS) nations are on the "front lines" of climate change impacts. They will be among the first to experience extreme disruption from climate change impacts, and they are among the least equipped—financially and technologically—to adapt to these changes. Therefore, AOSIS nations need climate adaptation assistance from the international community to ensure their continued survival as nations and peoples.

5. U.N. Framework Convention on Climate Change, Conf. of the Parties, 19th Sess., Nov. 11–22, 2013, Draft Decision -/CP.19, *Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*, U.N. Doc. FCCC/CP/2013/L.15 (Nov. 22, 2013), available at http://unfccc.int/files/meetings/warsaw_nov_2013/in-session/application/pdf/fccc.cp.2013.l.15.pdf. For a helpful background discussion of the UNFCCC foundation for a loss and damage mechanism, see Ilona Millar et al., *Making Good the Loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process*, in *THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE* 433 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

The first obstacle to Professor Burkett's approach concerns the scope of coverage. While it is true that many of the smaller AOSIS nations are in imminent peril of disappearing within the next few decades and would benefit greatly from the remedies that the CRC could offer, many other climate justice communities throughout the world face similar perils. Therefore, there would be a problem of inequitable scope in implementing Professor Burkett's CRC funding mechanism because it would be limited to AOSIS nations, yet other climate justice communities, such as the least developed nations in Africa and indigenous communities in the Arctic, would be ineligible for CRC funding despite their comparable need for assistance.

The logistics of climate adaptation are complex and have left gaps in other contexts as well. For example, under the Green Climate Fund,⁶ developed nations are committed to provide funding for a mechanism to support mitigation and adaptation measures in developing countries. Yet, indigenous communities in the Arctic may not receive assistance from this fund because only developing nations are eligible for Green Climate Fund assistance. Moreover, Arctic indigenous communities in the U.S. are not eligible to receive relocation assistance until after disaster strikes, and only for a limited number of enumerated natural disasters. Slow-onset climate change impacts, such as coastal erosion, are not among the enumerated natural disasters. Worse still, even if such communities were eligible for FEMA assistance, such assistance only supports temporary, rather than permanent, relocation costs.⁷

Given these inequalities among similarly situated climate-vulnerable populations, the focus should first be on "prevention" in addressing climate adaptation. This approach should be implemented at the international and domestic levels. At the international level, developed nations should contribute to funds like the Green Climate Fund to assist developing nations with adaptation measures *before* climate change-related disaster strikes. Similarly, in developed nations, there should be domestic climate adaptation funds to assist vulnerable populations like the indigenous communities in the Arctic, the United States, and Canada.

This proactive "prevention" assistance for climate adaptation is an important first step, but it is not enough by itself. Climate change impacts will continue to

6. U.N. Framework Convention on Climate Change, Cancun, Mex., Nov. 29–Dec. 10, 2009, Decision 1/CP.16, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, ¶ 102, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011), available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=17> (establishing the Green Climate Fund).

7. See generally Abate, *supra* note 1.

progress rapidly, and many of these vulnerable communities and nations will soon need assistance in the form of a “cure”—financial and technological assistance to secure a new place to call home. Such relocation may take two forms. First, it could involve internal relocation within the same nation, such as with Arctic indigenous communities. Second, it could involve transplanting climate refugee populations from an island nation to another nation for permanent residence in order to avoid the inevitable loss of habitability in their homeland due to sea-level rise.

It is here where Professor Burkett's proposal faces many additional challenges. By focusing on what happens between “prevention” and “cure” in the climate adaptation context, Professor Burkett's laudable proposal suffers from many logistical challenges concerning (1) the limitations of science, (2) the challenges of effectively administering the fund, (3) economic shortfalls from donor fatigue, and (4) a likely absence of political will to support such a fund.

Providing compensation for slow-onset events relating to climate change—for example, a loss of a fishery or a coral reef system due to ocean acidification—is difficult from the perspective of science for at least two reasons. First, it is difficult to determine when a resource is “lost” and eligible for compensation under this proposal. Second, it is also difficult to determine an exclusive connection to climate change for that loss.

Natural resources are resilient and are able to function in an impaired state for a long time. Therefore, it is difficult to determine with precision when a resource moves from “impaired” to “lost,” such that it would be eligible for CRC compensation. Slow-onset climate change impacts are not concrete, catastrophic events of limited duration, as such events are a much better foundation for a compensation fund. In the climate change context, multiple natural and anthropogenic factors are involved in causing ocean acidification, for example. Some of these factors are related to climate change (such as increased atmospheric carbon dioxide settling into ocean waters), while other factors contributing to ocean acidification are unrelated to climate change (such as other land-based pollution sources that are discharged directly into waters).

Regarding the administration of the CRC fund, one challenge is how to determine who would administer the payments and what criteria would be applied to prioritize them. The fact that both governments and individuals would be eligible to submit claims to the CRC raises a concern regarding possible duplication of payments to governments and groups or individuals for the same loss. Perhaps, a better approach would be to appoint an ombudsperson for each country through which all CRC claims would need to be filed and administered. Given that many claims would be filed for CRC

consideration, extensive guidelines would also need to be in place regarding how to prioritize such claims. The question arises as to whether it would be possible to properly prioritize voluminous meritorious claims when the pool of funds is finite. How can one properly decide which claim is more important—the loss of a fishery in Jamaica or the loss of a coral reef system in Barbados—where both countries have extensive economic, ecosystem, and cultural reliance on such resources?

The economic realities associated with Professor Burkett's proposal are similarly complex and problematic. The pool of available funding is limited and subject to the good will of the developed nations and potential private sector sources that would contribute to ensure the continued viability of the fund. The fund could easily face problems of donor fatigue and withdrawal of "buy in" for the CRC concept if claims proliferate to the point where maintaining funding would pose severe economic hardship for the donors. In addition, from a moral perspective, donors are much more likely to be generous in supporting relocation of island nations' peoples even if it is exceedingly costly, as opposed to being "nickel and dimed" for incremental costs associated with the loss of resources on the path toward climate change devastation.

The UN Compensation Commission (UNCC) as a model for the CRC is well intentioned but analytically flawed. Victims of the Iraq invasion of Kuwait suffered tangible losses associated with a catastrophic event of limited duration. The UNCC did succeed in providing broad-based relief from losses, including environmental damage associated with this conflict.⁸ Building on the success of the UNCC, the BP Oil Spill Fund worked effectively to compensate victims because this context also involved a concrete, catastrophic event of limited duration. Harms in these contexts—economic and environmental losses in wartime and those associated with an oil spill—were readily identifiable, and causation was not an issue.

Unfortunately, calculating the climate change-related losses for which the CRC would be responsible to determine compensation eligibility and amounts is a much less precise enterprise than the UNCC and BP Oil Spill Fund. A better approach to avoid the vagaries of calculating these elusive loss assessment

8. See generally Daniel A. Farber, *The UNCC as a Model for Climate Compensation*, in GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: ENVIRONMENTAL LIABILITY 242 (Cymie Payne & Peter Sand eds., 2011) (arguing that the UNCC's recognition of wartime impacts on the environment as cognizable under international law may establish a foundation for compensation for climate change impacts). Nevertheless, even though the UNCC arguably paved the way for compensation for environmental damages beyond those damages related to property losses, the leap from losses such as those involved in the UNCC and BP oils spill contexts to slow-onset climate loss is simply too ambitious.

determinations is two-fold: (1) funding to island nations for climate adaptation, and (2) a relocation funding mechanism. Residents of island nations will only relocate once, when their homeland becomes uninhabitable due to grave health and safety risks, and there must be a process and funding in place to secure a new and safe homeland for the climate displaced. The international community is unlikely to be willing or able to provide funding and political will to support more than these two costly investments.

